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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-293

JERRY YONO,
Petitioner,

v.

COLUMBUS LANDINGS, LTD.,
Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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JUDGMENT AND ORDER GRANTING ATTORNEY FEES

(United States District Court
Eastern District of Michigan
Southern Division)

(JERRY YONO, Plaintiff vs COLUMBUS LANDINGS LIMITED, Defendant. Civil Action No. 75-71151)

At a sesssion of said Court, held in the Federal Building, in the City of Detroit, Wayne County, Michigan, this 17th day of May, A. D. 1977;

Present: THE HONORABLE FRED W. KAESS, United States District Judge.

Trial of this matter having been held before this Court on May 4, 1977, and a decision having been duly rendered in a Memorandum Opinion of even date herewith;

IT IS ORDERED and ADJUDGED that a Judgment for No Cause of Action be, and hereby is, entered in this case.

IT IS FURTHER ORDERED that defendant be, and hereby is, granted statutory attorney fees and costs.

/s/ Fred W. Kaess
United States District Judge

MEMORANDUM OPINION

(United States District Court
Eastern District of Michigan
Southern Division)

On or about May 29, 1970, plaintiff and defendant entered into a contract for the sale of certain property located on the Island of San Salvador in the Bahamas. Plaintiff seeks rescission of this contract, both on the ground of fraud and of material breach of contract. Jurisdiction is founded on diversity pursuant to 28 U.S.C. §1332. Trial of this matter was held on May 4, 1977. The following Opinion constitutes the findings of fact and conclusions of law as required by Rule 52, Federal Rules of Civil Procedure.

Finding of Facts

Sometime in May, 1970, Jerry Yono, as trustee for the Yono Trust, signed a purchase agreement with representatives of Columbus Landings Company, which is a sales subsidiary of Columbus Landings Limited, a subsidiary of Investment Corporation of Florida. The purchase agreement specified that the land which was the subject of the sale included lots 56, 21, and 42, of blocks 35 and 36, of Columbus Landings I on the Island of San Salvador. However, at the time the agreement was signed, all parties understood that Mr. Yono had no intention of retaining the lots recited in the purchase agreement. Rather, it was their understanding that Mr. Yono wished to purchase hotel land for investment purposes. Although hotel sites were in the planning stage for Columbus Landings subdivisions II, III, and IV, no hotel sites were available for purchase at that

time. Therefore, the parties agreed that the land "purchased" would be traded for comparably priced hotel sites in either Columbus Landings II, III, or IV when such became available.

Paragraph #8 of the purchase agreement states

> The seller agrees to construct water bonded, graded rock roads throughout the Columbus Landings Subdivision shown on the plat and further guarantees that each lot covered by this agreement will have full frontage on such a road, accessible by automobile, before the expiration of the contract maturity period.

An addendum to this contract, drafted by Mr. Yono's attorney, was executed on the same day. Paragraph #1 of the addendum reads in pertinent part

> It is fully understood by the buyer that all roads must be completed within a maximum time limit of three (3) years. It is further understood when this is completed, if and when buyer completes all payments on this contract, deed will be issued to buyer.

At the time the agreement was signed, the plat showed only Columbus Landings I, since Columbus Landings II, III, and IV were still in the planning stage.

In accordance with their mutual understanding, on August 25, 1970, the purchase agreement was changed from the description mentioned above to lots 54, 20, and 44, blocks 33 and 38, Columbus Landings I. At this time Mr. Yono was assured by representatives of Columbus Landings that they were reserving Lot 4 in Block 6 of Columbus Landings III as his ultimate hotel site, and that the land would again be transferred as

soon as possible. This was accomplished by an amendment to the purchase agreement dated July 8, 1971.

Plaintiff alleges that Defendant Columbus Landings breached its contract by not constructing the roads as required by the agreement and addendum. Plaintiff asserts that the failure to construct these roads was a material breach of the contract sufficient to warrant rescission.

Mr. Yono testified that each time he visited his property, it was either by boat or by air, and that he never was able to visit the property by land. He stated that when he visited the island with his family in January, 1973, he thought he remembered that he had asked someone at the Inn to take him to his property, but that person had declined, stating that since it had been raining for four days, the roads would not be safe. Mr. Yono also testified that the completion of the roads was significant to the contract because without the roads, you would not be able to get to the land.

By the terms of the original purchase agreement and addendum, the seller agreed to construct "water bonded, graded rock roads." Mr. James Noell, President of Investment Corporation of Florida, parent corporation of Columbus Landings Company, testified that water bonded, graded rock roads leading to the hotel site owned by Mr. Yono and shown on the current plat were constructed within three years as required by the purchase agreement and the addendum.

Since this statement was never contradicted by plaintiff, the Court accepts it as part of the finding of fact. However, plaintiff's attorney asserted that the phrases, "the seller agrees to construct . . . roads

throughout the Columbus Landings Subdivision shown on the plat" and "all roads must be completed by three years" was intended to mean that all roads within all four subdivisions were to be completed within three years. Plaintiff's attorney contends that this requirement was inserted in order to insure plaintiff that the nearby property would be sold and substantially developed so that plaintiff's hotel would be financially successful. However, plaintiff did not testify to this effect.

The Court finds this interpretation highly unlikely. The purchase agreement was a standard form to be used by seller and the purchaser of any property on the 2000-acre development. It is highly unlikely that a developer, at that time selling property only in a single subdivision, would intend to agree that the other three subdivisions still in the planning stage would have *all* roads completed within a three-year period. It is far more likely that both parties understood that these phrases meant that all *access roads* to the property in question would be completed within the required time period. Further, this interpretation is consistent with the testimony of plaintiff during the course of the trial.

Discussion and Conclusions of Law

In the present case plaintiff appears to assert that failure to construct roads which would be passable after four days of heavy rain constituted a material breach of the contract. However, the contract provides only that water bonded, graded rock roads would be constructed by the seller. The Court has found that water bonded, graded rock access roads were indeed constructed before the specified three-year limit. Therefore, defendant is not in breach of its contract.

In addition, plaintiff contends that the failure to complete construction of all roads within the four subdivisions within the three-year period constitutes a material breach of contract justifying rescission.

While Michigan courts have permitted rescission for breach of contract, not all failure to comply with the terms of a contract entitle the other party to abandon the agreement. The general rule is stated in *Rosenthal* v. *Triangle Development Co.*, 261 Mich. 462, 463 (1933)

> Rather rescission is permissible when there is failure to perform a substantial part of the contract or one of its essential items of where 'the contract would not have been made if default in that particular had been expected or contemplated.' 1 Black on Rescission and Cancellation (2nd ed.) p. 553.

See also, Restatement, Contracts §293 (1933); *Restatement 2d, Contracts* §§262, 264, 266 (tentative draft, 1973).

As stated earlier, this Court rejects plaintiff's interpretation of the contract, and finds that defendant did not breach its contract with plaintiff.

However, even assuming that the proper interpretation of the contract is the one given by plaintiff, this Court finds that the failure to finish construction of all the roads within the Columbus Landings Subdivisions II, III, and IV does not constitute a material breach of the contract terms.

In determining whether a breach is material, justifying rescission, the Michigan courts have accepted the criteria set out in *Restatement, Contracts* (1933).

Walker & Co. v. *Harrison*, 347 Mich. 630, 635 (1957). Section 275 of *Restatement* states

> In determining the materiality of a failure fully to perform a promise the following circumstances are influential:
>
> (a) The extent to which the injured party will obtain the substantial benefit which he could have reasonably anticipated;
>
> (b) The extent to which the injured party may be adequately compensated in damages for lack of complete performance;
>
> (c) The extent to which the party failing to perform has already partly performed or made preparations for performance;
>
> (d) The greater or less hardship on the party failing to perform in terminating the contract;
>
> (e) The willful, negligent or innocent behavior of the party failing to perform;
>
> (f) The greater or less uncertainty that the party failing to perform will perform the remainder of the contract.

In the present case, plaintiff has received a hotel site bordering the ocean, with completed access roads as marked on the plat within the specified time limit. Several additional improvements have been made in the area by Columbus Landings Ltd., which increases the value of the land as a hotel site. The testimony established that the only hotel which is presently on the

island is completely booked with tourists through September of this year, and is substantially booked after that. A marina with scuba diving equipment is nearby, and is beginning to draw tourists.

Plaintiff purchased the property for investment purposes. At no time has he notified defendant that he wished to build on the property which he selected. It does not appear that he has any such plans in the foreseeable future. Plaintiff has introduced no evidence that the value of the property has diminished since its purchase in 1969. Nor was there any testimony to the effect that plaintiff would no longer be able to obtain substantial benefit, which he could have reasonably anticipated from the contract, because of the failure. On the other hand, most of the roads in question have already been completed, and are also being black-topped by defendant.

Therefore, the Court also finds that even should the contract be interpreted as plaintiff contends, defendant has substantially performed the contract, and any failure to complete construction of residential roads within the time limit constitutes only a technical breach of the contract. In such a case, plaintiff must resort to an action at law for damages.*

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* Even had such relief been requested in this Court, this Court could not properly make such an award since plaintiff has not introduced any evidence of damages. However, such an award would have to be based upon an interpretation of the contract which this Court has previously rejected.

Plaintiff further alleges that the Court should order rescission of the contract because of fraudulent representations made by defendant. In *Head* v. *Benjamin Rich Realty Co.*, 55 Mich. App. 348, 358 (1974), the court stated

> The question in this case is whether or not the plaintiffs were induced to purchase the property by reason of defendants' fraudulent representations. Plaintiffs had the burden of proof to establish the essential elements of their cause of action. Farida v. Zahar, 50 Mich. App. 137, 142; 212 N.W.2d 739 (1973), quoting from Papin v. Demski, 17 Mich App. 151, 154-155, 169 N.W.2d 351, 353 (1969), said:
>
> > 'The general rule is that to constitute actionable fraud it must appear: (1) that defendant made a material misrepresentation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance on it; and (6) that he thereby suffered injury.'

In the present case, plaintiff alleges that the statement in the purchase agreement discussed earlier was made without any intention to perform, and that since he relied upon the statement, it constitutes fraud. As the

Court has stated earlier, defendant did in fact construct a water bonded, graded rock road adjoining plaintiff's property and giving access to the property from the other areas of the island within the time specified in the contract. The Court has also found that this was the interpretation given to the contract by both parties. Therefore, the representation was not false. This Court has further found that even should the representation be literally interpreted, it was not material to the contract. Therefore, the representations in the contract did not constitute fraud, and as such cannot constitute a basis for rescission.

Plaintiff also asserts that certain statements made by a salesman, an employee of the defendant, were fraudulent. Plaintiff testified that the salesman stated that the island would be a gold mine, and that plaintiff would be able to make a profit within a year or two. He also testified to similar statements being made at the time of the purchase. It is well established that such statements constitute mere puffing on the part of a seller. As the Michigan court stated in *Hayes Construction Co.* v. *Silverthorn*, 343 Mich. 421, 426 (1955), *quoting from* Judge Learned Hand,

> 'There are some kinds of talk which no sensible man takes seriously, and if he does, he suffers from his credulity. If we were all scrupulously honest it would not be so; but, as it is, neither party usually believes what the seller says about his own opinions, and each knows it. Such statements, like the claims of campaign managers before election, are rather designed to allay the suspicion which would attend their absence than to be understood as having any relation to objective truth.'

Representations as to the value of a property are generally regarded as mere expressions of opinion. *People* v. *Jacobs*, 35 Mich. 36 (1876); *Buxton* v. *Jones*, 120 Mich. 522 (1899); *Sutton* v. *Benjamin*, 231 Mich. 153, 155 (1925). This is especially true where a plaintiff has had the opportunity to, and actually does, inspect the property before purchase. *Sutton, supra*, at 155. In the present case, the Court finds that the statements of defendant's agent were no more than mere expressions of opinion by a vendee, and do not constitute fraud. Therefore, no action for rescission lies based upon these statements.

In summary, plaintiff is not entitled to rescission of the contract either on the ground of material breach of an essential term of the contract or on the basis of fraudulent misrepresentation, and this Court shall therefore enter a Judgment for No Cause of Action and its Order Granting Attorney Fees to Defendant.

/s/ Fred W. Kaess
United States District Judge

Dated: May 17, 1977.
Detroit, Michigan